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No. 90-441

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In the

Supreme Court of the United States

October Term, 1990

IN RE: NWFX, INC.
PYBURN ENTERPRISES, INC. ..... *Petitioner*

V.

ALLEN W. BIRD, II
AS TRUSTEE FOR NORTHWEST
FINANCIAL EXPRESS, INC., NWFX, INC.,
AND GOLD FINANCIAL
EXPRESS, INC. ..... *Respondents*

ON WRIT OF CERTIORARI FROM
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLES W. BAKER
ROSE LAW FIRM
120 East Fourth Street
Little Rock, Arkansas 72201
Telephone (501) 375-9131

Attorney for Respondent

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SUMMARY OF ARGUMENT

The decision below affirmed a district court decision which reached the correct result, is fair to all the creditors of the debtor, NWFX, and preserves the principle of equality of distribution amongst creditors in bankruptcy. The Petition for Writ of Certiorari does not meet any of the enumerated circumstances in Rule 10 of the Rules of Supreme Court for the granting of Certiorari. Nor does the Petition set for any other special or important reason for the granting of Writ in this case.

ARGUMENT

I.

THERE IS NO CONFLICT BETWEEN THE TWO PRIOR DECISIONS OF THE EIGHT CIRCUIT COURT OF APPEALS THAT NEEDS TO BE RESOLVED.

There is no conflict between the two prior decisions of the Eighth Circuit Court of Appeals because the factual findings are different. Petitioner asserts that they present "similar circumstances" and that may well be true. However, the cases do have different facts which do account for the different results.

In the case of *In re NWFX, Inc.*, 864 F.2d 558, 590 (8th Cir. 1988) [hereinafter "NWFX I"] the bankruptcy and district court found and the Court of Appeals agreed that " . . . the bankruptcy court was correct in finding that the parties had not entered into an agreement for the sale of noninsured many orders." (A-43)

In the case of *In re NWFX, Inc.*, 864 F.2d 593, 594 (8th Cir. 1989) [hereinafter the "NWFX II"] the " . . . amounts were held in trust for the debtors pursuant to written trust agreements between the debtors and their agents." (A-33)

An agreement versus no agreement makes all the difference in the world and explains why one dealer was allowed to retain the money order proceeds and the other dealer was not.

NWFX I was decided on November 30, 1988. NWFX II was decided on January 5, 1989. The NWFX II panel had to know about the prior decision of the NWFX I panel and yet it did not mention the prior decision. That is because of the significant factual difference. That factual difference caused the issues that were argued and decided to be vastly different. Even a cursory review of the two decisions

reveals that the legal issues were markedly different. The difference in the legal issues flows from the presence versus the absence of an agreement between the debtors and the dealers.

In this case, there was a fact finding by the bankruptcy court and the district court that there was a Trust Agreement between the parties (A-23). Consequently those courts correctly followed the precedent of NWFX II.

This court has recently stated that it "... cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 107 S.Ct. 2617, 2623, 96 L.Ed.2d 572 (1987).

II.

THERE ARE NO IMPORTANT FEDERAL LAW QUESTIONS, UNANSWERED OR OTHERWISE, PRESENTED BY THIS CASE.

Petitioner set forth four "Questions Presented for Review" on page i of its Petition and asserts on page 8 that they are "... important and unsettled questions of federal law." The four questions simply do not present questions of federal law whether important, unsettled or otherwise.

The first question[1] is a choice of law question. Choice of law is a question of state law. In addition, the Petitioner did not plead in the bankruptcy court or the district court that Texas law should be applied. Neither did Petitioner argue

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[1]Is a contract between debtor, a seller of money orders, and its agent, governed by Texas law, where the agreement was executed and performed in Texas and where Texas had a substantial interest in protecting its citizens; or is it governed by Arkansas law, where the debtor is an Arkansas corporation and filed for bankruptcy protection in the state of Arkansas?

on appeal to the Eighth Circuit that Texas law should be applied until after the panel opinion was handed down.

The Eighth Circuit panel decision, which was vacated, recognized that neither party had asked for the application of Texas law when it said " . . . (t)he parties' repeated reference to Arkansas law in their briefs suggests that they assume that Arkansas law controls the interpretation of the NWFX-Pyburn agreement." (A-12) *In re NWFX, Inc.*, 881 F.2d 530, 535 (8th Cir. 1989).

The second question[2] is a breach of contract question. This second question is a question of state law. Indeed all four of the "Questions Presented for Review" are questions of state law. " . . . (S)tanding alone, a challenge to state law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review." *Haring v. Prosise*, 462 U.S. 306, 314 n. 8, 103 S.Ct. 2368, 2373 n. 8, 76 L.Ed.2d 595 (1983).

The third question[3] is an inaccurate statement of the issue that was tried and argued below. The Trustee's Complaint against the dealer was for breach of contract, not for turnover of property of the estate. Please note the last paragraph on page 3 of Petitioner's own "Statement of the Case", the first paragraph of the Proposed Findings of Fact and Conclusions of Law Regarding the Entitlement of Prejudgment Interest from Pyburn Enterprises, Inc. by bankruptcy judge Fussell (A-26) and the vacated panel decision which recognized that " . . . (t)he trustee sought damages for Pyburn's alleged breach of contract . . . " (A-6) *In re NWFX, Inc.*, 881 F.2d 530, 533 (8th Cir. 1989).

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[2]Did the debtor breach its agency contract when it became insolvent and filed a bankruptcy, resulting in the dishonor of its money orders nationwide?

[3]Were refunds made by the agent to purchasers of the debtor's dishonored money orders, property of the debtor's estate, and subject to turnover to the bankruptcy trustee?

The fourth question[4] is, on its face, a question of the assessment of pre-judgment interest when a breach of contract has been found. That is a question of damages and not of bankruptcy and is certainly not a federal question. This question was decided by two lower courts (the bankruptcy court and the district court), both of which deal on a daily basis with the question of pre-judgment interest. This court has previously said that " . . . federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues." *Butner v. United States*, 440 U.S. 48, 58, 99 S.Ct. 914, 919, 59 L.Ed.2d 136 (1979).

III.

THE DECISION BELOW REACHED THE CORRECT DECISION ON THE LAW AND THE RESULT IS EQUITABLE.

The Petitioner entered into a written trust agreement with NWFX in which it agreed to hold all proceeds from the sale of money orders, after deducting a service charge, for the exclusive benefit of and to pay them over to NWFX. The Petitioner breached the trust agreement when, instead of paying the proceeds to NWFX, it paid the proceeds to Petitioner's customers.

If the Petitioner's defense is upheld, the effect will be that creditors of NWFX, who happened to be customers of Petitioner, would have their claims paid in full, while other creditors of NWFX, who are similarly situated, will not be paid in full and indeed will not even receive an equal pro rata share of the assets of NWFX. That is because the assets of NWFX would be diminished by the amounts retained by the Petitioner. Such an outcome violates " . . .

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[4]Should prejudgment interest be assessed against the debtor's agent as a matter of law when to do so would be inequitable?

the prime bankruptcy policy of equality of distribution among creditors of the debtor." H. Rept. No. 95-595, pp. 178, 95th Cong., 1st Sess. (1977).

IV.

THIS CASE DOES NOT PRESENT QUESTIONS THAT ARISE FREQUENTLY OR INVOLVE LARGE NUMBERS OF PEOPLE OR AMOUNTS OF MONEY.

This case arises from the bankruptcy of a corporation that sold money orders. None of the decisions below cited any controlling cases involving bankrupt money order sellers. There are very few bankruptcy cases reported that involve money order sellers in any way, shape, form or fashion.

The decision in this case will only decide the rights between the Petitioner and the Trustee of NWFX. While it is true that there are many other purchasers of money orders and creditors of NWFX whose dividend will be less if the Trustee losses, nevertheless, the amount of difference on an individual basis will be trivial.

The outcome of this case is not going to affect many people in the future because this kind of case does not happen very often. Even if it did, the only questions are questions of contract, damages and choice of law.

CONCLUSION

The decision below was correct on the law, reached an equitable result and does not leave the decisions of the Eighth Circuit in conflict. No special or important reason exists for granting the Petition because there is no conflict between the circuits, or decision of a state court of last resort or question of federal law.

Respectfully submitted,

CHARLES W. BAKER
ROSE LAW FIRM
120 East Fourth Street
Little Rock, Arkansas 72201
Telephone (501) 375-9131

Attorney for Respondent

CERTIFICATE OF SERVICE

I, Charles Wayne Baker, do hereby certify that a copy of the above and foregoing has been mailed by ordinary mail with sufficient postage affixed thereon, on this 4th day of October, 1990 to:

United States Court of Appeals
For the Eighth Circuit
U.S. Court & Customs House
1114 Market Street
St. Louis, Missouri 63101

The Honorable H. Franklin Waters
United States District Court
Federal Building
Fayetteville, Arkansas 72701

The Honorable Robert F. Fussell
U.S. Bankruptcy Court
P.O. Box 2381
Little Rock, Arkansas 72203-2381

Allen Bird, II, Esq.
120 E. Fourth Street
Little Rock, Arkansas 72201

Mark A. Colbert
P.O. Box 1300
Little Rock, Arkansas 72203-1300

Ms. Caroline Scott
Assistant Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

CHARLES WAYNE BAKER